

May 31, 2000

D.T.E. 99-105

Investigation by the Department of Telecommunications and Energy, on its own motion, as to the propriety of the Local Service Provider Freeze terms and conditions set forth in the following tariff: M.D.T.E. No. 10, Part A, Section 5, Original of Page 1.1, filed with the Department on November 1, 1999 by New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts

APPEARANCES: Barbara Anne Sousa, Esq.

185 Franklin Street, Room 1403

Boston, Massachusetts 02110

FOR: NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY d/b/a BELL
ATLANTIC - MASSACHUSETTS

Petitioner

Thomas F. Reilly, Attorney General

By: Karlen J. Reed

Assistant Attorney General

200 Portland Street, 4th Floor

Boston, Massachusetts 02114

Intervenor

Alan D. Mandl, Esq.

Mandl & Mandl, LLP

10 Post Office Square, Suite 630

Boston, Massachusetts 02109

-and-

Christopher McDonald, Esq.

MCI WorldCom, Inc.

200 Park Avenue, 6th Floor

New York, New York 10166

FOR: WORLDCOM, INC.

Intervenor

Jay E. Gruber, Esq.

Palmer & Dodge, LLP

One Beacon Street

Boston, Massachusetts 02108

FOR: AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

Intervenor

Eric Krathwohl, Esq.

Rich, May, Bilodeau & Flaherty, PC

176 Federal Street

Boston, Massachusetts 02110

-and-

Jordan Michael, Esquire

CTC Communications Corp.

360 Second Avenue

Waltham, Massachusetts 02154

FOR: CTC COMMUNICATIONS CORPORATION

Intervenor

Linda L. Oliver, Esq.

Jennifer A. Purvis, Esq.

Marshall D. Fitz, Esq.

Hogan & Hartson, LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

-and-

Terry Monroe

Vice President, Industry and Government Relations

The Competitive Telecommunications Association

1900 M Street, N.W., Suite 800

Washington, D.C. 20036

FOR: THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

Intervenor

Christopher H. Kallaher, Esq.

essential.com

3 Burlington Woods Drive, 4th Floor

Burlington, Massachusetts 01803

FOR: ESSENTIAL.COM

Intervenor

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I. INTRODUCTION AND PROCEDURAL HISTORY

On November 1, 1999, New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts ("Bell Atlantic" or "BA-MA" or "Company") filed with the Department of Telecommunications and Energy ("Department") a revision to M.D.T.E. Tariff No. 10, Part A, Section 5, Original of Page 1.1, with an effective date of December 1, 1999. The revision introduced the provision of a Local Service Provider Freeze ("LSPF") for Bell Atlantic's business and residential customers.

On November 30, 1999, the Department docketed its investigation of Bell Atlantic's proposed tariff as D.T.E. 99-105, and suspended the effective date of the tariff until June 1, 2000. On February 8, 2000, the Department held a public hearing and procedural conference, and granted intervenor status to AT&T Communications of New England, Inc. ("AT&T"), MCI WorldCom, Inc., now WorldCom, Inc. ("WorldCom" or "MCIW"), the Attorney General of the Commonwealth ("Attorney General" or "AG") and CTC Communications Corp. ("CTC"). On March 1, 2000, the Department granted the petitions to intervene of essential.com and the Competitive Telecommunications Association ("Comptel").

On April 13 and 14, 2000, the Department held evidentiary hearings in this docket. At the hearings, Bell Atlantic presented the testimony of Harold E. West. WorldCom presented the testimony of Mindy J. Chapman. AT&T presented the testimony of Dawn Russell. The evidentiary record consists of 87 exhibits. The record also includes 13 responses by various parties to record requests, including one post-hearing record request. At the request of the parties, the Hearing Officer incorporated by reference the 1999 Annual Returns of Bell Atlantic and AT&T filed with the Department and the August 1999 Local Competition Report of the Federal Communications Commission ("FCC").⁽¹⁾ The Hearing Officer also took administrative notice of an Order Granting in Part and Denying in Part Petition for Reconsideration of the State of New York Public Service Commission dated December 23, 1998. Initial briefs were filed by Bell Atlantic, AT&T, WorldCom and the Attorney General. Reply briefs were filed by Bell Atlantic, AT&T, WorldCom, the Attorney General and essential.com. On May 10, 2000, WorldCom filed a request with the Department to take administrative notice of Bell Atlantic-New York's ("BA-NY") voluntary postponement, until October 1, 2000, of the effective date of its proposed LSPF tariff in New York.⁽²⁾ Bell Atlantic objected on May 17, 2000, stating WorldCom's request was untimely and therefore procedurally improper. Bell Atlantic further stated that the BA-NY postponement took place in March 2000, and WorldCom had sufficient opportunity prior to the closing of the record in this proceeding to introduce this information. WorldCom responded on May 19, 2000, that it was previously unaware of BA-NY's action and the timing of BA-NY's action does not diminish or negate its relevance to this proceeding. The Department hereby denies as untimely WorldCom's request to take administrative notice of Bell Atlantic's actions in New York.

II. BELL ATLANTIC'S PROPOSED TARIFF - OVERVIEW

Bell Atlantic proposes to offer LSPF to its business and residential customers (Exh. BA-5, at 2). Bell Atlantic intends to make LSPF available to customers as a means of protection from unauthorized changes to its customers' local service (*i.e.*, "slamming") (*id.*). The freeze will prevent a change in the customer's provider of local service unless the change is requested by the customer (*id.*). Bell Atlantic will only offer LSPF to customers if that customer's local service has been slammed, if the customer is concerned that he or she will be slammed, or if the customer explicitly requests that his or her local service be protected from slamming (*id.* at 3). Bell Atlantic will not charge for the activation or removal of LSPF (*id.*). During the course of the proceeding, Bell Atlantic offered additional information regarding its proposed LSPF offering. For example, the LSPF offering would not affect intraLATA or interLATA toll services, and would be made available to all Bell Atlantic resellers (Exh. DTE-14). Although Bell Atlantic stated that it has no plans to market LSPF actively or notify customers of the option of LSPF, Bell Atlantic stated that it reserved the right to do so in the future (Exhs. DTE-13; MCIW-28). Further, the activation and removal procedures for LSPF would be virtually the same as for other types of service freezes (Exh. DTE-26).

III. STANDARD OF REVIEW

The Department's standard to determine whether to allow Bell Atlantic's proposed tariff to go into effect must be considered against the backdrop of federal and state statutes and regulations on slamming and common carriers, as well as Department precedent. Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act")⁽³⁾ and codified at 47 U.S.C. § 258, prohibits a telecommunications carrier from changing a subscriber's carrier selection except as prescribed by the FCC.⁽⁴⁾ On December 23, 1998, the FCC released rules and regulations implementing Section 258 of the 1996 Act, which were designed to deter the practice of slamming.⁽⁵⁾ In its Second Report and Order, the FCC adopted various rules addressing verification of subscribers' preferred carrier changes and preferred carrier freezes, including local service freezes.⁽⁶⁾ The FCC permitted freezes of local service, but left it to individual State commissions to determine if a moratorium on the imposition or solicitation of local preferred carrier freezes would be appropriate to prevent incumbent local service providers from anti-competitive conduct. Second Report and Order

In December 1998, the Massachusetts Legislature enacted St. 1998, c. 327, codified as G.L. c. 93, §§ 108-113 and G.L. c. 159, § 12E, the Commonwealth's anti-slamming statute. That law protects Massachusetts consumers from slamming of their local or long distance telecommunications carriers and requires that the Department promulgate regulations to implement certain provisions of the statute. The statute also gave the Department discretion to establish procedures to curb slamming. On November 12, 1999, the Department adopted final rules implementing provisions of the Massachusetts anti-slamming law. These rules are found in 220 C.M.R. §§ 13.00 et seq., but do not specifically address LSPF. On May 28, 1997, the Department issued its Order in IntraLATA Presubscription, D.P.U. 96-106, at 40 (1997), in which the Department determined that Bell Atlantic's proposed intraLATA toll preferred carrier freeze was reasonable. In IntraLATA Presubscription, the Department encouraged all carriers to follow FCC guidelines for obtaining appropriate authorization for preferred carrier changes. Id.

Pursuant to G.L. c. 159, §§ 19 and 20, the Department must determine whether Bell Atlantic's proposed rates, terms, and conditions in its tariff are "just and reasonable." The right of a common carrier to make rules and regulations, subject to the approval of the Department and the requirement of reasonableness, has been long recognized. Wilkinson v. New England Telephone and Telegraph Company, 327 Mass. 132, 135 (1951).

IV. LOCAL SERVICE PROVIDER FREEZE

- Whether a Local Service Provider Freeze is Reasonable for Massachusetts Consumers

1. Introduction

There is considerable disagreement among the parties whether it is reasonable to make LSPF available at this time to Massachusetts consumers as a tool to combat local slamming. The arguments against LSPF of WorldCom, AT&T and essential.com (collectively, "the CLECs") include, inter alia, the lack of local competition, absence of local slamming, and remote likelihood of local slamming. The CLECs' arguments relating to the effect Bell Atlantic's proposed LSPF would have on the development of local competition are addressed more fully in section IV.B., below.

- Positions of the Parties
 - Bell Atlantic

Bell Atlantic argues that the CLECs presented no evidence in this proceeding to refute Bell Atlantic's position that introducing LSPF at this time in the Massachusetts market is not anti-competitive (BA-MA Brief at 3). Bell Atlantic further argues that the CLECs likewise failed to present any evidence of anti-competitive effects resulting from LSPF in any of the eleven Bell Atlantic jurisdictions in which LSPF is currently available (id.).

Bell Atlantic points out that slamming is an industry-wide problem which both the FCC and the Department have addressed through rules governing the unauthorized switching of both local and long distance service providers (id. at 4). Bell Atlantic argues that both competition and slamming currently exist in the Massachusetts local market (BA-MA Brief at 5; BA-MA Reply Brief

at 2). Bell Atlantic presented evidence that 431 customers contacted Bell Atlantic in 1999, claiming to have had their local service switched without their authorization (BA-MA Brief

at 5; BA-MA Reply Brief at 3). Bell Atlantic interprets the dissatisfaction expressed by these 431 customers as legitimate concerns about local slamming (BA-MA Brief at 5). Bell Atlantic claims that to require customers to document that their local service has actually been slammed before they may obtain LSPF would unduly burden customers and only benefit the slamming carrier (BA-MA Reply Brief at 4). Bell Atlantic further argues that the barriers that the CLECs claim currently exist to prevent local slamming (*i.e.*, the lack of monetary incentives to an unscrupulous carrier, the likelihood of being caught, and the practical complexities involved in slamming local service) have little bearing on whether customers should have the option, if they so choose, of freezing their local accounts (BA-MA Brief at 5). Bell Atlantic argues that even if local slamming is "highly unlikely," the CLECs cannot assert that local slamming will never occur, and those customers for whom local slamming is a concern should not be denied the ability to protect their local service (BA-MA Reply Brief at 4).

- Attorney General

The Attorney General agrees with Bell Atlantic that LSPF should be available at this time to Massachusetts consumers (AG Brief at 2; AG Reply Brief at 2). The Attorney General notes that the Department has approved preferred carrier freezes in the Massachusetts intraLATA toll market, and that other State commissions have adopted LSPF (AG Brief at 2). The Attorney General recommends that the Department take at face value the 431 consumer complaints of local slamming submitted by Bell Atlantic (AG Reply Brief at 2). The Attorney General does not support the position that only customers who have experienced a "bona fide" slam should have the option of LSPF; rather, the Attorney General argues that all customers should have access to LSPF (AG Reply Brief at 3). The Attorney General urges the Department to allow Massachusetts consumers the benefit of an LSPF option and recommends a number of modifications to Bell Atlantic's proposed tariff to minimize the burden that LSPF may place on local competition (discussed in section IV.B., below) (AG Brief at 3; AG Reply Brief at 2, 4).

- CLECs

The CLECs oppose the allowance of Bell Atlantic's tariff (see generally, WorldCom Brief at 4; AT&T Brief at 2; essential.com Reply Brief at 2). WorldCom agrees that LSPF should be made available to Massachusetts consumers, but argues that this is not the time to do so (WorldCom Brief at 4; WorldCom Reply Brief at 11).

The CLECs argue that because Bell Atlantic is a virtual monopoly in the local exchange market, there is essentially no benefit to consumers from LSPF (WorldCom Brief at 7, 15). The CLECs assert that allowing LSPF prior to opening of the local market would only create additional barriers to market entry by Bell Atlantic's future competitors (WorldCom Brief at 7-8). WorldCom disputes Bell Atlantic's contention that 35 local exchange carriers are present in the Massachusetts market (WorldCom Brief at 14). Although WorldCom submits there is "minimal" competition in limited urban and business segments of the local market, WorldCom argues that the overall lack of competition in the local market evidences the unlikelihood that local slamming will even occur (WorldCom Brief at 15). WorldCom suggests that the Department delay the implementation of LSPF until local exchange competition has increased to such a level that the need for LSPF is broad (WorldCom Reply Brief at 16). WorldCom suggests the appropriate time for implementation of LSPF is one year after formal approval of Bell Atlantic's Section 271 application or before that time if a sufficient number of documented incidents of local slamming were confirmed (id. at 16-17).

The CLECs argue that Bell Atlantic has failed to demonstrate that local slamming actually has occurred in Massachusetts (WorldCom Brief at 8; AT&T Brief at 5; essential.com Reply Brief at 3). The CLECs dispute Bell Atlantic's contention that 431 Massachusetts customers experienced local slamming in 1999 (WorldCom Brief at 15; AT&T Brief at 5; essential.com Reply Brief at 3). The CLECs point out Bell Atlantic's failure to investigate the 431 slamming allegations and assert that many of the alleged local slamming complaints were attributable to problems other than local slamming (WorldCom Brief at 16; AT&T Brief at 4). The CLECs conclude that these alleged complaints cannot be relied upon as examples of local slamming activity (WorldCom Brief at 17; AT&T Brief at 5; essential.com Reply Brief at 4). essential.com argues that without the crucial information concerning the extent of actual local slamming, the Department has no basis upon which to determine that LSPF is warranted (essential.com Reply Brief at 4). AT&T further asserts that there has been no local slamming in Massachusetts at all (AT&T Brief at 5). By investigating the information provided by Bell Atlantic regarding the 431 local slamming complaints, AT&T concluded that it could not have slammed the residential customers claimed by Bell Atlantic because neither AT&T nor its affiliates market local residential service in Massachusetts (AT&T Brief at 6).

The CLECs argue that because the unauthorized conversion of a local exchange customer involves considerably more difficulty than the unauthorized conversion of a toll customer, the likelihood of any future local slamming is extremely remote (WorldCom Brief

at 8; AT&T Brief at 6-7). The CLECs state that because there are numerous steps in changing local service, the required coordination between the customer and the local carriers make a successful local slam highly unlikely (WorldCom Brief at 17-18; AT&T Brief at 7-8). AT&T further argues that the high probability of immediate discovery, the improbability of getting paid for the switch, and higher transaction penalties and other penalties under the Massachusetts anti-slamming law add up to significant disincentives

to engage in local slamming (AT&T Brief at 8-9). essential.com argues that the Massachusetts General Court has already addressed the subject of local slamming in G.L. c. 93, §§ 108-113 and the Department should not interfere with the balance created by that statute (essential.com Reply Brief at 6-7). essential.com points out that the Legislature did not include LSPF in its anti-slamming measures and submits that this indicates that the Legislature chose not to adopt LSPF as a measure to prevent slamming (essential.com Reply Brief at 7). essential.com further argues that the mere presence of an LSPF option will erode consumer confidence in the local market, by calling attention to a problem that does not exist (essential.com Reply Brief at 6). In sum, the CLECs contend that if local slamming literally does not occur, and that if the likelihood that local slamming will ever occur is very small, then LSPF is unwarranted, especially when its effects can be detrimental to the objective of promoting local competition (AT&T Reply Brief at 4; essential.com Reply Brief at 4-6).

AT&T and essential.com argue that LSPF is unreasonable because it will impose additional costs on carriers whose prospective customers have a freeze in place (AT&T Brief

at 10-11; essential.com Reply Brief at 5). If the customer who seeks to switch carriers does not lift the freeze, the switch to the new carrier will be rejected, creating additional costs to the new carrier in following up and reworking the order (AT&T Brief at 11; essential.com Reply Brief at 5). essential.com contends that carriers will also incur additional costs when determining if a freeze is in place and in educating prospective customers in LSPF removal (essential.com Reply Brief at 5). AT&T maintains that these additional costs will ultimately be borne by the consumers (AT&T Brief at 11).

Lastly, WorldCom argues that Bell Atlantic should be required to address issues regarding UNE-P and line sharing arrangements before it is allowed to offer LSPF (WorldCom Brief at 34-35, WorldCom Reply Brief at 7).⁽⁷⁾ WorldCom asserts that if Bell Atlantic is unable to satisfy the Department through a compliance filing on these issues, any offering of LSPF by Bell Atlantic would be unreasonably discriminatory (*id.* at 35).

- Analysis and Findings

The Department declines to accept the CLECs' recommendation that the Department bar LSPF in Massachusetts at this time. The Department finds that LSPF can be an effective tool to prevent local slamming, just as its counterparts, the interLATA and intraLATA toll freezes, are in their respective markets. Therefore, Bell Atlantic and other local service providers may make LSPF available as an option for Massachusetts consumers to use, if the consumers choose to do so, to deter slamming of local service. In reaching this conclusion, the Department considered several factors. The Department balanced issues of consumer protection and consumer choice with the Department's desire to facilitate increased competition in the local market and its concomitant benefits to consumers. The Department concludes that LSPF can be introduced at this time with appropriate safeguards (discussed in section IV.B., below).

The Department emphasizes that LSPF is a voluntary measure. A consumer must make an affirmative choice to freeze his or her local service, and in doing so, must be made to appreciate the consequences of the choice, as with any other freeze option. See Second Report and Order at ¶¶ 121-123; 47 C.F.R. § 64.1190. Even if we accept at face value the CLECs' arguments regarding the small, if any, degree of current "actual" local slamming and the remote likelihood of future local slamming, the Department concludes that these factors will contribute to less of a demand from consumers for LSPF, rather than supporting the CLECs' arguments to prevent the allowance of LSPF. Likewise, the Department declines to postpone allowance of LSPF until some unspecified time under future market conditions. The Department expects that LSPF's near-term effect to constrain local competition, if any, will be de minimus.⁽⁸⁾ Moreover, as competition in the local market inevitably increases, LSPF will become increasingly useful to consumers. The Department likewise does not find it necessary to postpone LSPF implementation until after an unspecified number of documented "actual" local slams have occurred. It would be imprudent for the Department to require the very harm to occur that it is seeking to prevent. The Department does not agree with essential.com's assertion that the mere presence of an LSPF option will erode consumer confidence in the local market. Rather, the Department concurs with the FCC's conclusion that the option of freezes, including LSPF, "enhances competition by fostering consumer confidence that they control their choice of service providers." Second Report and Order at ¶ 114.

The Department further declines to accept essential.com's argument that by enacting the Massachusetts anti-slamming law, G.L. c. 93, §§ 108-113 and c. 159, § 12E, the Legislature chose to reject LSPF as an option for Massachusetts consumers. Under the anti-slamming law, the Legislature accorded the Department considerable discretion to establish procedures to curb slamming in Massachusetts. See G.L. c. 93, §§ 109(c)(4), (5), 110(k), 112(c), 113(e); c. 159, § 12E(b). Further, since the anti-slamming law was enacted, the Department has instituted other freeze related procedures that were not specified in the anti-slamming statute. See Tel-Save, Inc., D.T.E. 98-59 (1999) (development of secure website for preferred carrier freeze removal). A statute that offers broad public protection should not be given a pinched or narrow construction that would thwart its central purpose. Therefore, the Department does not interpret its authority to allow LSPF as constrained by the anti-slamming statute's lack of particular reference to LSPF.

The Department likewise rejects WorldCom's recommendation that LSPF not be permitted until Bell Atlantic has resolved all of the technical issues relating to LSPF and

UNE-P and line sharing arrangements. These technical issues received little treatment in the record and in the parties' briefs.⁽⁹⁾ Bell Atlantic has indicated it is currently in the process of addressing LSPF and UNE-P issues (Exh. DTE-15; Tr. at 1:51-52). Line sharing issues are also the subject of an open proceeding currently being investigated at the Department, Bell Atlantic Interconnection Tariff, D.T.E. 98-57 (Phase III). Therefore, the Department does not find the technical issues to be a sufficient basis for rejecting LSPF.

While deciding that it is reasonable at this time to make LSPF available to Massachusetts consumers to use, if they choose to do so, as a tool to prevent local slamming, the Department acknowledges both the parties' and the FCC's concerns about potential anti-competitive implementation and administration of LSPF. We address those issues below.

B. Implementation of LSPF

1. Third Party Administrator

a. Introduction

If the Department authorizes Bell Atlantic to make LSPF available to consumers, AT&T and WorldCom recommended that it be administered by a neutral third-party administrator ("TPA") and not by Bell Atlantic (Exhs. ATT-18, at 15; MCIW-1, at 13).

b. Positions of the Parties

1) Bell Atlantic

Bell Atlantic contends that AT&T and WorldCom have failed to demonstrate any basis for requiring a TPA, claiming that a TPA would constitute a departure from established FCC procedures, would unnecessarily impose added costs for duplicative systems, and would be unduly burdensome to administer (BA-MA Brief at 4, 11). Bell Atlantic argues that it plans to apply all the applicable FCC verification requirements for securing and lifting LSPF on a customer's account, and that those requirements comport with Massachusetts rules governing carrier changes (BA-MA Brief at 10-11). The Company states that neither the FCC nor any state in which LSPF is available uses a TPA, and that Bell Atlantic and the industry as a whole would incur considerable costs for creating a redundancy of existing systems and functionality without providing any real benefit (BA-MA Brief at 11-12; BA-MA Reply Brief at 10). Accordingly, Bell Atlantic argues that the Department should reaffirm the multiple ways of placing and lifting preferred carrier freezes established by the Department and the FCC, and reject AT&T and WorldCom's proposal for a TPA for LSPF (BA-MA Brief at 12; BA-MA Reply Brief at 10).

2) Attorney General

The Attorney General states that although the use of a neutral TPA to administer LSPF has merit, he claims that the record is insufficient to support its adoption (AG Reply Brief at 3).

3) CLECs

The CLECs recommend that if Bell Atlantic's proposed LSPF tariff is adopted, the Department should require the creation of a TPA (AT&T Reply Brief at 10; WorldCom Brief at 21). The CLECs contend that the only way to assure that the administration of

LSPF is handled in a neutral and fair manner is to create an independent TPA (AT&T Brief at 18; WorldCom Brief at 21). WorldCom further recommends that the implementation of LSPF should be deferred in order to allow for additional fact-finding by the Department in order to build a more complete record regarding LSPF administration through a TPA (WorldCom Reply Brief at 16). AT&T claims that Bell Atlantic cannot be a neutral administrator of freezes as long as it holds the vast majority of the market, and that it would be too easy for Bell Atlantic to encourage customers to freeze their service before the market becomes competitive, and then resist efforts to lift the freeze by interfering with a customer's choice to switch carriers (AT&T Brief 18-19).⁽¹⁰⁾ AT&T claims that Bell Atlantic has provided no evidence that it would administer LSPF in a neutral manner other than promises and citations to existing FCC and state regulations (AT&T Reply Brief at 7). The CLECs contend that despite the existence of federal and state anti-slamming regulations, Bell Atlantic has engaged in illegal acts while administering service provider freezes in the toll market, citing to recurring instances where Bell Atlantic has excluded a competing carrier's representative from a three-way call involving the customer in violation of federal law, or has engaged in illegal marketing practices to "win back" a customer who has opted to switch to a competing carrier (AT&T Reply Brief at 8; WorldCom Brief at 21-22). The CLECs contend that they have also experienced either extremely long holding times, or had no answer at all, on calls made to Bell Atlantic in order to lift service provider freezes (AT&T Reply Brief at 8; WorldCom Brief

at 21-22).

c. Analysis and Findings

The Department finds that a TPA is not a prerequisite for LSPF implementation in Massachusetts. While the CLECs vigorously supported the concept of a TPA, this support did not include sufficient details on how such a system would work or how it would be funded. Therefore, the Department does not find an adequate basis in the record to mandate the use of a TPA for LSPF. Even if the record were more developed on this point, we are not convinced that a TPA is necessary or appropriate. We note the FCC's recent rejection of a national industry-sponsored TPA for administration of the FCC's slamming liability rules in favor of individual State commissions. First Order on Reconsideration at ¶¶ 22-28. However, the Department is concerned about the possibility of improper telephone conduct by Bell Atlantic when participating in three-way calls with the CLECs and consumers. When a customer requests LSPF to be placed on or removed from his or her account prior to effectuating a local carrier change, the Department will require Bell Atlantic to adhere strictly to both the FCC's and the Department's clear and specific preferred carrier change and freeze removal procedures (see section IV.B.2.b., below).

2. Safeguards

- Conditions Under Which Bell Atlantic May Offer LSPF and Related Marketing Issues

1) Introduction

Bell Atlantic has stated that it does not have plans to market LSPF actively at this time, or notify its customers regarding the availability of LSPF (Exh. MCIW-28). The LSPF tariff is somewhat generic in nature, in that it does not incorporate any specific terms or conditions under which Bell Atlantic will make LSPF available, or include the procedures for establishing or lifting a freeze (Exh. DTE-8). Further, although Bell Atlantic stated that it generally provides scripts to its customer contact personnel for their use in dealing with customers, Bell Atlantic has not prepared any scripts or Massachusetts-specific materials to provide to its customer service representatives for use in applying Bell Atlantic's LSPF policy (Tr. at 1:140-141).

2) Positions of the Parties

i) Bell Atlantic

Bell Atlantic states that it will not actively market or promote LSPF, consistent with the policy upheld by the Department when presubscription was introduced in IntraLATA Presubscription, D.P.U. 96-106 (1997) (BA-MA Brief at 2; Exh. MCIW-18). Bell Atlantic asserts that it has incorporated the "no marketing" principle into its methods and procedures, and for the foreseeable future, will abide by that prohibition (BA-MA Brief at 7). Bell Atlantic's restriction on marketing LSPF is a voluntary policy that is consistent with the manner in which Bell Atlantic offers LSPF in the eleven jurisdictions where it is currently available (BA-MA Brief at 7). Bell Atlantic argues that contrary to AT&T and WorldCom's recommendation, it should not be required to incorporate its self-imposed "no marketing" policy in its LSPF tariff because of changing market conditions (BA-MA Brief at 3, 7; BA-MA Reply Brief at 6).

With respect to including the terms and conditions under which LSPF would be made available into its tariff, Bell Atlantic objects, stating that it does not generally include its internal administrative practices in its tariffs (Tr. at 1:96-98; Exh. DTE-8). Bell Atlantic argues that its LSPF proposal is reasonable, and that, contrary to the CLECs allegations, Bell Atlantic will not coerce customers into choosing LSPF (BA-MA Brief at 6). As for sales guidelines and scripts, Bell Atlantic has provided the Department with copies of its methods and procedures used in other Bell Atlantic jurisdictions where LSPF is currently available (BA-MA Reply Brief at 7). Bell Atlantic states that its expressed commitment not to market LSPF negates any need to provide scripts or educational materials as requested by WorldCom (BA-MA Reply Brief at 7-8).

ii) Attorney General

The Attorney General argues that Bell Atlantic should be prohibited from actively marketing LSPF until such time as the Department determines that the local market is open (AG Reply Brief at 3). The Attorney General recommends the development and distribution of pre-approved customer education materials through a CLEC collaborative effort within 60 days of the LSPF tariff's approval (AG Brief at 3; AG Reply Brief at 3). The Attorney General also advocates the prior approval of sales scripts and quality assurance plans (AG Reply Brief at 3).

iii) CLECs

The CLECs argue that the Department must expressly order Bell Atlantic to not engage in the marketing of LSPF, and must include that prohibition in any approved LSPF tariff (WorldCom Reply Brief at 7-8; AT&T Reply Brief at 10). WorldCom points out that the Department prohibited Bell Atlantic's marketing of freezes in the toll market, and that competitors of Bell Atlantic in the local market need even greater protection against Bell Atlantic's marketing of LSPF than they needed from the marketing of toll carrier freezes (WorldCom Reply Brief at 7). The CLECs stress that the Department should not rely on measures that Bell Atlantic could discontinue the day the LSPF tariff is approved (essential.com Reply Brief at 9). WorldCom objects to the Attorney General's recommended use of a billing insert until such time as there is sufficient competition in the local market, stating that any action that puts local slamming in the public's mind will result in a direct benefit to Bell Atlantic (RR-AG-2). AT&T states that a bill insert, if properly created, could serve as a competitively neutral educational vehicle to inform consumers of the control they have over the placement and removal of local service freezes (RR-AG-5). However, a LSPF bill insert would only be appropriate if Bell Atlantic's LSPF tariff were implemented with a neutral administrator, and only after the local services market is truly competitive (RR-AG-5).

AT&T further asserts that Bell Atlantic has provided no firm guidelines on when a customer will be informed that LSPF is available, nor an explanation of how such an offering would be different from active marketing (AT&T Brief at 16). AT&T contends that Bell Atlantic has gone no further than to simply assure the parties that it will not steer, scare, or coerce customers into choosing LSPF (AT&T Brief at 16). WorldCom states that the assurances of Bell Atlantic that it would offer LSPF to its customers only under three specified circumstances, not expressly provided for under its proposed tariff, will not preclude massive abuses by its customer service representatives (WorldCom Brief at 30).⁽¹¹⁾ WorldCom argues that Bell Atlantic should not be allowed to offer LSPF to a customer who simply expresses "concern," or in any way merely makes a reference to slamming, even when there is no mention of local service (WorldCom Reply Brief at 13). The CLECs recommend that Bell Atlantic's LSPF should be expressly limited to the situation in which a customer has established that a bona fide unauthorized switch in their local service has occurred, after consultation with the customer and the carrier alleged to have switched the customer without authorization (AT&T Brief at 10; WorldCom Brief at 29-30).

WorldCom further points out that Bell Atlantic has developed no scripts for its customer service representatives or detailed methods and procedures to carry out LSPF (WorldCom Brief at 9, 30). The CLECs add that there must be assurances that Bell Atlantic's practices will be in full compliance with the FCC's regulations and policies (WorldCom Brief at 33; AT&T Brief at 16). The CLECs argue that Bell Atlantic's proposed informal processes is disturbing in light of past situations in which the CLECs have experienced problems with Bell Atlantic's customer service representatives when attempting to switch services or lift a freeze during three-way calls (AT&T Brief at 17). The CLECs argue that the lack of such scripts, procedures and materials creates a high likelihood of anti-competitive behavior by Bell Atlantic personnel, given Bell Atlantic's natural incentive to retain customers (WorldCom Brief at 31). The CLECs recommend that Bell Atlantic be required to submit to the Department for its approval detailed internal procedures and scripts for the training of its customer service representatives to follow during LSPF calls; guidelines for monitoring sales representatives during these calls, enforcement procedures, and effective remedies for anti-competitive activities (WorldCom Brief at 10, 33-34; AT&T Brief at 20, AT&T Reply Brief at 10).

3) Analysis and Findings

The Department finds it reasonable to restrict Bell Atlantic's marketing of LSPF to ensure that Bell Atlantic does not use LSPF in an anti-competitive manner. As we did in D.P.U. 96-106 with toll freezes, the Department will preclude Bell Atlantic from actively marketing or promoting LSPF and will only allow Bell Atlantic to make LSPF available to those customers that request it. See IntraLATA Presubscription at 40. While the Department does not concur with the CLECs' recommendation that LSPF be made available to only those consumers who have experienced a "bona fide" slam, the Department does find it reasonable to restrict Bell Atlantic from discussing LSPF with customers, and from offering to place LSPF on a customer's account, unless either local slamming has occurred in a customer's account or the customer initiates a slamming inquiry directly. The Department declines to accept the Attorney General's recommendation to require Bell Atlantic to distribute customer education materials on LSPF, and likewise, declines to require Bell Atlantic to distribute a bill insert to its customers on the subject. Such action is not necessary at this time. If local slamming becomes more of a problem, we may reconsider this.

However, the Department finds it reasonable to require additional language in Bell Atlantic's LSPF tariff to inform current and future competitors of Bell Atlantic of the specific procedures in Massachusetts for activation and removal of its LSPF. Likewise, the Department requires Bell Atlantic to incorporate language in its compliance tariff defining the prohibition on active promotion of LSPF, that LSPF is not a default, that it is not automatically applied to customers who have other preferred carrier freezes, and that LSPF can be activated or removed independently of other preferred carrier freezes. The tariff should also specify that Bell Atlantic may only discuss LSPF with customers when the customer himself initiates a slamming inquiry or local slamming in a customer's account has occurred. The Department also requires Bell Atlantic to file its Massachusetts-specific methods and procedures regarding LSPF and its Massachusetts

customer service staff education materials and scripts. We will review these materials and determine whether they are consistent with our prohibition against active marketing of LSPF. Finally, if credible evidence shows that Bell Atlantic has not followed our prohibition against active marketing of LSPF, and that the benefit of LSPF to consumers becomes outweighed by anti-competitive LSPF implementation, the Department will suspend LSPF until Bell Atlantic demonstrates that it has taken steps to correct such errors.

b. Removal Issues

1) Introduction

In its Second Report and Order, the FCC required that carriers, at a minimum, provide the following three methods for removing a preferred carrier freeze: a subscriber's written and signed authorization stating the intent to lift the freeze (i.e., letter of agency); a subscriber's oral authorization to remove the freeze; and a three-way conference call involving the submitting carrier, the subscriber, and the local exchange carrier. Second Report and Order

at ¶¶ 128-129. In Tel-Save, Inc., D.T.E. 98-59, at 14-15 (1999), the Department concluded that use of a secure website for preferred carrier freeze removal was reasonable and consistent with the FCC's requirements that additional methods of freeze removal be simple, understandable and secure. See Second Report and Order at ¶ 127. In Tel-Save, the Department required Bell Atlantic to: 1) design and develop a secure web page for customers to remove preferred carrier freezes; 2) notify all interexchange carriers of the availability of the web page and how to link to it; 3) notify customers of the availability of the site through a bill insert; 4) develop graphics and text through a collaborative process with the parties in the case; 5) make all necessary changes to its tariffs to reflect the findings and file compliance tariffs within 30 days of the Order; and 6) directed that changes should be made to Bell Atlantic's tariffs to reflect a customer's ability to remove freezes for intrastate, interLATA and intraLATA services. Tel-Save at 14-17. In the instant proceeding, the parties disagree whether the FCC and Department ordered procedures are sufficient for consumer removal of Bell Atlantic's proposed LSPF.

2) Positions of the Parties

i) Bell Atlantic

Bell Atlantic argues that its proposed procedures for removing LSPF are in compliance with FCC and Massachusetts rules (Exh. BA-2, Att. I; BA-MA Reply Brief at 5). Although the specific language is not included in the LSPF tariff filed with the Department on November 1, 1999, Bell Atlantic states that it will enable customers to remove LSPF electronically using a secure website (BA-MA Brief at 9; BA-MA Reply Brief at 5). Bell Atlantic submitted an illustrative tariff during the proceeding which includes proposed website removal language (RR-DTE-1). Bell Atlantic submits that use

of a secure website to remove LSPF allows customers to manage their carrier freezes without directly interfacing with service representatives from any of the carriers (BA-MA Brief at 9). Bell Atlantic states that a consumer could negotiate service with a new carrier within minutes of removing LSPF via the website (BA-MA Brief at 9 n.9). Bell Atlantic further argues that third party verification of a carrier change should not be, in and of itself, sufficient to lift LSPF (BA-MA Brief at 10; BA-MA Reply Brief at 5-6). Bell Atlantic states that the FCC has rejected this position because it would eliminate the consumer's ability to exercise complete control in protecting his or her account (BA-MA Brief at 10; BA-MA Reply Brief at 6). Bell Atlantic contends that if a third party verification could be used to simultaneously change carriers and lift a freeze, the basic premise of LSPF, which is to allow consumers to choose to require an additional step as an anti-slamming mechanism, would be undermined (BA-MA Brief at 10). Bell Atlantic states that, in addition to sending a letter of agency or using the secure website, a residential customer may remove (or add) LSPF by calling Bell Atlantic during the following hours: Monday through Friday from 7:30 a.m. to 8:00 p.m. and Saturday from 8:00 a.m. to 5:00 p.m. (RR-DTE-3). A business customer may call Bell Atlantic's business office during the hours from 8:30 a.m. to 5:00 p.m. Monday through Thursday, and Friday from 9:00 a.m. to 5:00 p.m. (id.).

ii) Attorney General

The Attorney General recommends that Bell Atlantic's tariff be revised to provide for an Internet-based option to its customers for lifting LSPF as required in Tel-Save, D.T.E. 98-59 (1999) (AG Brief at 3; AG Reply Brief at 4). The Attorney General does not support the CLECs' proposal to allow third party verification to change carrier requests and lift LSPF in one phone call (AG Reply Brief at 3). The Attorney General argues that while allowing third party verification to perform both functions at once may speed the carrier change process, it would also eliminate the extra protection intended by LSPF (id.).

iii) CLECs

AT&T disagrees with Bell Atlantic and the Attorney General that use of a secure website for LSPF removal will help facilitate carrier changes (AT&T Brief at 13). AT&T argues that it will never know when a prospective customer has accessed the website to remove the freeze and therefore will not know when to submit its change order (id.). AT&T argues that not all consumers have access to the Internet, or those that do have only dial-up access and one telephone line, so AT&T could not assist them as they navigate through the program to lift the freeze (id.). AT&T further argues that website removal is ineffective for business customers, who may have thousands of lines, as website removal is structured to lift freezes only one line at a time (id.).

WorldCom argues that the Department should provide that LSPFs may be overridden by a third party verification (WorldCom Brief at 28). WorldCom states that Southern New England Telephone Company has agreed to such an arrangement and asks the Department to require the same of Bell Atlantic (id.). WorldCom argues that this method

is "consumer friendly" because it permits a consumer with LSPF to effectuate a carrier change through fewer steps while retaining the protections of third party verification for both the carrier change and freeze removal processes (id.; WorldCom Reply Brief at 15).

AT&T further argues that access to Bell Atlantic customer service representatives to remove freezes is inadequate (AT&T Brief at 12). AT&T argues that the hours during which Bell Atlantic is able to take calls are limited due to service representatives not being available in the mornings and late afternoons and evenings (id.). AT&T contends that a customer will often be put on hold while AT&T tries to reach a Bell Atlantic representative or the call to Bell Atlantic is not even answered, and therefore the freeze removal request is unable to be processed (id.).

3) Analysis and Findings

Consistent with its Order in Tel-Save, the Department finds that Bell Atlantic's tariff must be revised to reflect the option of LSPF removal through a secure website. The Department requires Bell Atlantic to include language in the web page regarding the availability of LSPF removal through the web page.⁽¹²⁾ The Department further requires Bell Atlantic to notify all local service providers in Massachusetts of the availability of the web page and how to link to it. While the Department is cognizant of the CLECs' concerns regarding access to Bell Atlantic's service representatives during peak times, the Department expects that the web site will provide an effective avenue for those customers seeking to lift LSPF outside of Bell Atlantic's regular business hours and during times of heavy call traffic. The Department does not agree with WorldCom's contention that third party verification of a carrier change should be sufficient to remove LSPF. The Department concurs with the FCC's determination that "[w]ere we to allow third-party verification of a carrier change to override a preferred carrier freeze, subscribers would gain no additional protection from the implementation of a preferred carrier freeze." Second Report and Order at ¶ 131. Therefore, if a consumer has sought additional protection by choosing LSPF, the Department will not permit third party verifiers to make the choice meaningless by overriding the LSPF.

c. Customer Record Information

1) Introduction

The CLECs assert that they will have no way of knowing whether LSPF is on a prospective customer's account until after the service order has been rejected by Bell Atlantic, causing consumer dissatisfaction, as well as unnecessary delays and additional costs to the CLECs. If LSPF is introduced, the CLECs demand access to LSPF information in a pre-order environment. Bell Atlantic claims that LSPF information will be available on its customer service records ("CSRs").

2) Positions of the Parties

i) Bell Atlantic

Bell Atlantic contends that all carriers will have LSPF information available to them on a real-time basis by accessing Bell Atlantic's CSRs (BA-MA Brief at 8). Bell Atlantic contends that CSRs contain a Field Identifier Code that indicates whether LSPF has been processed or removed from a customer's local service account (BA-MA Reply Brief at 8). By accessing this information, carriers can determine whether a prospective customer has implemented LSPF or has removed LSPF at the time of customer contact (BA-MA Brief at 8; BA-MA Reply Brief

at 9). Bell Atlantic states that because of the sensitive marketing information contained on a CSR, Bell Atlantic requires appropriate customer authorization (either oral or written) before Bell Atlantic releases the information (RR-AG-1; BA-MA Brief at 8 n.7). Bell Atlantic argues that its real-time provisioning of LSPF information is further proof that it will offer LSPF in a competitively neutral manner, as LSPF information will be available to other carriers at parity with Bell Atlantic (BA-MA Brief at 8; BA-MA Reply Brief at 8-9).

ii) Attorney General

The Attorney General argues that Bell Atlantic should be required to ease a CLEC's ability to discover the existence of LSPF by including a LSPF indicator on both the CSR and the customer's monthly statement (AG Brief at 3). The Attorney General argues that this revision will allow a customer and the CLEC to detect the presence of a LSPF easily during the early stages of the ordering process, so that a change that is desired by the customer can take place without unnecessary delay (AG Brief at 3). The Attorney General contends that requiring an LSPF indicator on both the CSR and the customer's monthly statement will reduce the likelihood that an order to change local service providers will be rejected due to an unremoved LSPF (AG Reply Brief at 3).

iii) CLECs

The CLECs argue that Bell Atlantic should make LSPF information available to its competitors on a real time basis and at parity with Bell Atlantic's own access to LSPF information (WorldCom Brief at 24; AT&T Brief at 14). The CLECs argue that without this information, many legitimate orders to change local service providers will be delayed or lost (WorldCom Brief at 25). WorldCom states that often consumers do not know or remember whether they have put a freeze on their account and this lack of information puts the CLECs at a disadvantage (WorldCom Brief at 25-26). WorldCom recommends that the Department order Bell Atlantic to submit a detailed plan and time line under which it will make customer LSPF information available to its competitors on a real-time basis, assure the performance of its real-time systems through pre-LSPF implementation testing, and develop written procedures for use by competitors to request LSPF information when they access a CSR (WorldCom Brief at 26). WorldCom further argues

that the Department should require Bell Atlantic to provide its competitors with parity access to information on when a freeze has been lifted (WorldCom Brief at 27). Without this information, WorldCom argues, competitors are forced to guess when an order to change carriers may be submitted (WorldCom Brief at 27). In response to Bell Atlantic's claim that real-time access to LSPF information on a CSR is currently available, the CLECs argue that they did not have the opportunity to question Bell Atlantic's witness about this claim, that Bell Atlantic has not provided written information to CLECs on how to access this information, and that this claim was only submitted in the form of a response to a record request (WorldCom Reply Brief at 14-15; AT&T Brief at 14). If the Department does allow LSPF, AT&T recommends that the Department make the demonstrated provision of real-time LSPF information available to CLECs through Bell Atlantic's operational support systems ("OSS") a condition of approval (AT&T Brief at 15; AT&T Reply Brief at 6). AT&T recommends that KPMG test Bell Atlantic's capability to provide LSPF information on a CSR as part of the ordering process in the third party testing under way in D.T.E. 99-271 (AT&T Reply Brief at 6 n.2).

3) Analysis and Findings

The Department agrees with the CLECs and the Attorney General that real-time access to LSPF information on parity with Bell Atlantic via a customer's CSR is important in a competitive marketplace. The Department notes that in the FCC's Second Report and Order, the FCC encouraged local exchange carriers to consider whether freeze indicators might be part of any operational support systems made available to new providers of local service. Second Report and Order at ¶ 133. However, Bell Atlantic has shown to the Department's satisfaction that it currently has the ability to provide real-time access to LSPF information on CSRs to CLECs prior to the issuance of a service order (RR-AG-1; Exh. MCIW-18). Bell Atlantic has shown that this information is accessible by CLECs at the time of customer contact with the authorization of the customer (RR-AG-1). The Department finds that this adequately addresses the CLECs' concerns by allowing the CLEC to confirm, at parity with Bell Atlantic, whether the prospective customer has requested or removed LSPF before the CLEC issues a service order. The Department does agree with the CLECs that Bell Atlantic should provide written information to all Massachusetts local service providers, in the form of a notification letter, concerning how the existence or removal of LSPF is indicated in a CSR. However, the Department does not find it necessary to require pre-implementation testing of Bell Atlantic's capability to provide LSPF information on CSRs. The Department chooses not to accept the Attorney General's recommendation that a LSPF indicator be required on customers' monthly statements due to the costs required to reprogram Bell Atlantic's billing system and the existence of alternative ways to confirm LSPF. If a Bell Atlantic customer is unsure whether she has chosen LSPF or not, the customer has several avenues to take to make that determination, including contacting Bell Atlantic (with or without the CLEC in a three-way call), by authorizing the CLEC's access to the CSR, or by connecting to the website. Therefore, while acknowledging the importance of CLECs' access to real-time LSPF information on parity with Bell Atlantic, the Department concludes that this information is available in a reasonable manner through CSRs.

V. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the revision to New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts tariff M.D.T.E. No. 10, Part A, Section 5, Original of Page 1.1, filed with the Department on November 1, 1999, is hereby DENIED; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts shall file a revised tariff in compliance with the directives contained herein within 30 days; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts shall comply with all other directives contained herein.

By Order of the Department,

_____ James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. Local Competition: August 1999, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission.

2. WorldCom also requested that the Department prevail upon Bell Atlantic to voluntarily withdraw its proposed LSPF tariff in Massachusetts. The Department declines to grant this request.

3. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

4. SEC. 258 [47 U.S.C. 258] ILLEGAL CHANGES IN SUBSCRIBER CARRIER SELECTIONS.

(a) Prohibition.-No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.

5. Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508 (1998) ("Second Report and Order"), stayed in part, MCI WorldCom, Inc. v. FCC, No. 99-1125 (D.C. Cir. May 18, 1999).

6. See Second Report and Order at ¶¶ 112-138. On May 3, 2000, the FCC released Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket No. 94-129, First Order on Reconsideration, FCC 00-135 (May 3, 2000) ("First Order on Reconsideration"),

amending certain of the liability rules for slamming established in the Second Report and Order.

7. Bell Atlantic's witness was unable to confirm whether or not a Bell Atlantic voice line with LSPF will create a rejected order if a competitor of Bell Atlantic wants to serve the same customer with DSL over a shared line (Tr. at 1:142). Bell Atlantic's witness was also unable to confirm whether a different result would occur if Bell Atlantic or a Bell Atlantic affiliate were to provide the DSL product (Tr. at 1:142-143). Further, Bell Atlantic stated that it cannot currently apply LSPF to UNE-P accounts, although it is working on developing an offering to allow LSPF to UNE-P accounts (Exh.

DTE-15).

8. Bell Atlantic's witness testified that in the Bell Atlantic jurisdictions in which Bell Atlantic currently offers and administers LSPF only a "very, very small percentage of the total accounts" have LSPF (Tr. at 1:75).

9. Of all the parties, only WorldCom briefly addressed UNE-P and line sharing in its Initial and Reply Brief (WorldCom Brief at 34-35; WorldCom Reply Brief at 7). Only the Attorney General responded to WorldCom's argument (AG Reply Brief at 3).

10. AT&T notes its support of the creation of a TPA on a national level (AT&T Brief at 18).

11. Bell Atlantic stated that it will only offer LSPF to customers under the following three conditions: 1) if that customer's local service has been slammed, 2) if the customer is concerned that he or she will be slammed, or 3) if the customers explicitly requests that his or her local service be protected from slamming (Exh. BA-5, at 3).

12. Bell Atlantic indicated that implementation of LSPF removal on its secure web page will require 45 days from the date of LSPF tariff approval (RR-DTE-1). The Department finds this time period to be reasonable.